"ONE DOOR TO THE CORPS"

<u>Deputy Commanding General's Acquisition Perspective</u> Contracting As Part of the Product Delivery Team MG Albert Genetti

The following notes reflect the highlights of an interview with MG Albert Genetti on the question: What near term future efforts and initiatives do we need to take in the field of contracting?

- Contracting must begin as an integral, up-front piece of the project planning process. As we modernize and reengineer all of our business processes, we are eliminating as many sequential hand-offs as we can. This must be true of our contracting business as well. We need to move toward and get comfortable with simultaneous processing. This means including our contracting officers and specialists and our project management staff as members of the same product deliver team. We must involve contracting experts up front, as part of the project planning process. This allows us to make key contracting decisions early in the process and prevent those do-loops that slow us down and make us cost more. Involvement of this contracting expertise early in the process permits us to determine the acquisition options that best fit each product delivery plan. We can also make early decisions on such issues as how best to involve small, women-owned or small/disadvantaged businesses. Including these decisions in our product plans up front gets the whole product delivery team communicating better, focused on the same targets and promotes achievement of goals, rather than trusting to accidental goal accomplishment.
- Contracting agencies are ideal organizations for innovation, "out of box," sharing risk with private sector. It is through this contracting tool that we link our governmental functions with private sector functions. As we contract out more and more of our operations, for an ever more complex array of products and services, our opportunities to pursue new contracting concepts will proliferate. Our target should always be to find the most efficient and equitable way to deliver better products and services for our customers our contracting partners are the means by which we deliver these products and services. I challenge all of us to remember that the contracting process enables us to deliver the goods—and better goods are what our Vision is all about. Our Scenario Based Strategic Planning process identified "Innovative Contracting" as one of USACE's Key Success Factors for future success.
- □ I agree with this evaluation, and encourage you to pursue innovative, customer friendly, contracting concepts.
- DAWIA clearly tells us what a professional, trained contracting staff looks like. We must have educated and

experienced experts in this field on our USACE team. But, they cannot do the job alone. They must work with our engineers and other technical staff as well as with the administrative folks to get the job done—this has been and must continue to be the real strength of the Corps. Thus, all of us have the responsibility to ensure that these parties mesh well into a cohesive product delivery team. Refining communications linkages, work processes, and joint training doctrine will go a long way to improving the output of the product deliver teams. If all of these participants mesh well we will be able to warrant our work, to plan and deliver quality, integrated products that meet customer needs the first time.

Because Commanders are no longer contracting officers, some may consider that they are no longer involved in the "contracting" aspects of a project. WRONG!! Commanders command their Districts and are responsible for every product delivery process and team in their Districts. Commanders make key business decisions in their Districts and must have expert advice from every functional member of the product delivery team to do so. BUT, it is very important to differentiate between a business decision and a "contracting officer's" decision. I still occasionally run across examples of where commanders abrogate their command responsibilities allowing contracting officers to make business decisions. We have heaped a bunch of change on how we plan, program, deliver and operate projects in a very short time. I hear Corps members talking in strange tongues now more frequently as, what used to be ironclad stovepipes are beginning to realize "teams" succeed and the team is only as strong as the weakest link. And while we are the U.S. Army Corps of Engineers remember that we deliver our stuff through — A CONTRACT!

PARC's Corner

"PARC POTPOURRI"

Some Thoughts on Where Corps Acquisition Professionals Must Be Focused to Move From Acquisition Reform to the Creation of a New Acquisition Culture

The **entire Acquisition Team** must be committed to revolutionizing acquisition strategies and business processes and sharing a vision of the new Acquisition roles required in this Post-Cold War Era.

Acquisition Reform was never meant only to be Contracting Reform – the entire lifecycle of the acquisition process – from requirements determination to disposal must be of critical concern for change.

We must form Integrated Process Teams and the Contracting Officer must become capable and accountable to each integrated acquisition team as its business advisor/business manager or business broker.

As a team, we must accelerate the culture change; we must be more successful at identifying and adapting new behaviors; we must force the new behaviors to result in successful outcomes that equate to not only delighted customers, but efficient operations, high employee morale, reduced cycle time and reduced cost, without any sacrifice in quality!

Know that the OPARC and the HQ Acquisition Team are focused on accelerating not only Acquisition Reform, but also an accelerated cultural change in our total acquisition landscape, through aggressive actions! Look for greater dynamics in:

ii

- Changing the rules
- Providing the right toolbox through Road Show Training and "Contracting Days"
- Rewarding the workforce wherever significant contributions result in successful outcomes the A-F-I-R-E award
- Firmly "Walking the Talk"
- Training and educating the workforce and all stakeholders for new roles as critical and entrepreneurial thinkers and value-added partners

Each acquisition professional must be committed to:

- Thinking Corporately We are "One Corps of Engineers"
- Continuous Improvement
- Institutionalizing Integrated Team Processes A Collaborative Environment
- Measuring Customers and Contractors satisfaction on team process
- Hubbing and Spoking activities that reduce the Division Cost Footprint
- Managing Contracts to successful outcomes
- Being comprehensive and timely in assessing past performance
- Publicizing team successes and sharing strategies and lessons learned
- Ensuring Integrity of the Corps' procurement process at every node of the acquisition lifecycle Ethics/Regulatory and Statutory compliance cannot be compromised
- Rewarding behavior based on results
- Visiting the work sites and staying decisively engaged in nurturing successful outcomes

If we as the Corps of Engineers are going to become a business – we've got to

start acting like one!

As PARC, I would like to see more aggressive leaps toward:

- Sharing Acquisition Strategies
- Institutionalizing and Using Appropriately the OPARC Bulletin Board Inventory of IDIQ Contracts
- Using Defense Systems Management College to professionalize our PMs to attain Certification from the Project Management Institute (PMI)
- Smart Longer Term Contracts to reduce workload and effect the ultimate in quality results, not "no value bundling" that adversely affects effective competition
- Small Business Set-Asides for High Dollar Requirements up to and in excess of \$200M especially in the Environmental Services Area
- A move from buying things/services to managing our trading partners to successful outcomes
- Integrated Enterprise Solutions
- Taking Ideas from Industry and adapting to Government by providing objectives and expected performance through Broad Agency Announcements (BAAs) strategies to invite more ideas
- Quickly abandoning mental models of old processes that hinder or kill change
- A true commitment to revolutionizing for effectiveness

Workforce Assessment: I firmly believe our workforce has the capacity to think keenly within the framework of the rules

of the FAR and the acquisition Reform Initiatives, but I also believe that that's not good enough for these times

our Acquisition Professionals must expand their horizons for thought and analyses and our decisions must be based on business cases.

I also believe our success is based on creating and nurturing relationships among all partners and on-site visits to projects is a must.

We must facilitate empowerment to the lowest levels by providing a new toolbox of skills which develop leadership and critical and entrepreneurial thinking – and we must accelerate the change in culture by first changing some of the rules. We must teach, train, and assist all elements of our acquisition workforce to gain the strength we need for "One Corporate Corps".

Know that some members of our acquisition workforce are tired and do not have the energy for this post-cold war, uncertain, but dynamic era, so managers and leaders must raise the bar to the right minimums for training, education and experience to ensure that all acquisition professionals can affirmatively commit to effecting successful outcomes, at all costs. As we "rightsize", stretch those who remain to function as business managers with broader program knowledge and with a vision to set the Corps A-F-I-R-E in contract formation and management with new concepts of Adaptability, Flexibility, Innovativeness, Responsiveness, and Efficiency/Effectiveness.

THE CORPS ACQUISITION TEAM SHALL BE CORPORATELY FOCUSED FOR SUCCESS

Begin <u>Now</u> to assess <u>How You can acquire <u>New Behaviors</u>, <u>New Values</u> for a smooth <u>Evolutionary Cultural</u> Change rather than a Forced Revolutionary Cultural Change!</u>

Provide your ideas, lessons learned and philosophy to be included in PARC NOTES!!!



We welcome all comments and suggestions, so get them in before the 15th of the month. (e-mail Ingrid Williams or telephone (202) 761-0568, FAX: (202) 761-4752)

Upcoming Highlights

- # A-F-I-R-E Trophy Award Guidelines
- # On-Site Roadshow Beginning July 1999
- # Focus on Contractor Improvement and Viability# More thoughts on accelerating Culture Change in 1999
- # Performance Based Service Contracting, NAD --Pittsburgh
- # Some thoughts on moving from Buying Goods/Services to Managing our Trading Partners Pittsburgh's

Incremental Funding Initiative

Inside Contents

*	News About Us (OPARC)	1
.	"PARCing" Information Throughout the Corps (PARC staff)	
	Comptroller General's Decision Sustains Bid Protest, Based Upon the Bid the Rights of the Government	dder Attempting to Limit 1
	Inspection of the Acquisition of Information Technology	3
	Central Contractor Registration (CCR)	5
	Industrial Relations Update	7
	Y2K	9
*	Highlights from the Corps Contracting Community	
	Acquisition and Partnering – Northeast Resident Office	11
	DC Public Schools – North Atlantic Division	13
	Galveston District Intern shares Disaster Experience	13
	2-Phase Design Build	14
	In Saudi Arabia, negotiation is an art, not a science	15
*	What's New on the Career Front/Training Update	
	Sustaining Base Leadership and Management Program (Resident)	17
Per	Huntsville Salutes the New Commercial IT course for Contracting rsonnel	18
	What Contractors Want the Corps of Engineers to Know – Contractors edback thru the PARC's Open Door Policy	
	Small Business Set-Asides for High Dollar Requirements	23
*	DAR Council Highlights	25
٠.	Flactronic Rid Sats	27

NEWS ABOUT US

Michael Organek had been the Procurement Analyst for the US Army Installation Support Center, Fort Belvoir, VA since January 1991. He served as consultant and procurement expert in support of the US Army Directorates of Public Works on a worldwide basis. In this capacity, he provided acquisition consultation and guidance to installations and MACOMS in the areas of RPMA contracts and information to preclude development of contract administration problems.

Previously, Mr. Organek has been: Supervisory Contract Administrator/Contracting Officer (unlimited warrant), Directorate of Contracting, FT Ord, CA; Contract Administrator, US Army Korea Contracting Agency, Seoul, Korea; Procurement Analyst, US Army Korea Contracting Agency; Procurement Analyst, 7th Signal Command, FT Ritchie, MD; and a Department of the Army Intern, 7th Signal Command FT Ritchie, MD.

Professional Certifications: Army Acquisition Corps Eligible; Defense Acquisition Workforce (DAWIA) Level III Certified in Procurement and Contracting; Professional Designation in Contract Management, Air Force Institute of Technology; and Professional Certification in Contract Management, Army Logistics Management College.

Education: BA in Political Science and English from Mount Saint Mary's College and has taken graduate level courses towards a Master's in Business. Administration.

"PARCing" INFORMATION THROUGHOUT THE CORPS (PARC Staff)

Comptroller General's Decision Sustains Bid Protest, Based Upon the Bidder Attempting To Limit the Rights of the Government. (Michael Organek, CEPR)

Background:

- On February 10, 1999, the Comptroller General sustained a post-award protest by Company "B" concluding that
 the awardee's bid, "Company "A", under an invitation for bid (IFB) issued by a USACE District, for repair and
 improvement of jet fuel storage area, was nonresponsive because it modified material terms of the solicitation,
 limited the contractor's liability to the government, and limited the rights of the government under the contract.
- The District issued the IFB with an established date for bid opening. The total lump sum price for purposes of evaluation and award was to include a total of nine "major work items" listed in the IFB. Prices were sought for seven basic items relating to repairs and upgrades at the Pumphouse No. 1 site, and two options relating to repairs and upgrades at the bulk fuel storage tanks. Item No. 0009, the option item central to this case, involved lowering the high-level shut-off valves on three bulk fuel

storage tanks.

• Twelve bids were received at bid opening. Company "A" was the apparent low bid, and Company "B" was the apparent second low bidder.

• The bid submitted by Company "A" included the following statement, identified as a bid "qualification":

Bid Item #9 – Tanks will be cleaned and gas free by government before commencement of work.

Facts surrounding the bid protest:

The contracting officer rejected Company's "A" bid as nonresponsive because the statement placed a condition on the bid. In written notice to Company "A" the Contracting Officer cited Federal Acquisition Regulation (FAR) \Rightarrow 14.404-2(d), which provides:

[a] bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the Government, since to allow the bidder to impose such conditions would be prejudicial to other bidders.

- Company "A" responded to the contracting officer with a letter of protest, asserting that the solicitation required award to it as the lowest bidder, and that the bid qualification could be waived as a minor informality, since, there was not a specified condition requiring the tanks be cleaned and gas-free. <u>A</u> second letter followed the protest from Company "A", notifying the contracting officer that the qualification to Bid ltem No. 9 was being withdrawn.
- After receiving legal and technical counsel, the contracting officer determined Company "A" should be allowed to
 delete the qualification from its bid because the condition was one of form, not substance. See FAR '14.405. This
 decision was based on a finding that the qualification did not make Company "A" nonresponsive, because the
 contract specifications did not specifically require work to "clean" the tank and make them "gas-free." Accordingly,
 award was made to Company "A", and Company "B" filed its GAO protest.

Comptroller General's adjudication and analysis:

- The Comptroller General stated at the outset of its legal analysis, that to be responsive and considered for award, a bid must contain an unequivocal offer to perform, without exception, in total conformance with the material items of the solicitation. The purpose for this requirement is to deny individual bidders the opportunity to reserve rights or immunities that are not extended to all bidders by the conditions and specifications advertised in the IFB. Therefore, a bid must be rejected if in it, the bidder imposes conditions that would modify material requirements of the invitation or limit the government's rights under any contract clause. Moreover, the Comptroller General noted that a bid which is facially nonresponsive cannot be made responsive by post-bid opening clarifications or corrections.
- The Comptroller General analysis turned to the instructions provided in the IFB for performance of Item No.
 9, which tasked "lowering existing high level alarm valves for three of the above ground storage tanks",

and stated the contractor would be working in an area with significant hazardous environmental. In light of the safety hazards, it was noted in the Summary of Work that special attention should be given to the "vapor-freeing of existing fuel components." The term "gas-free" in Company "A's" bid qualification can reasonably be interpreted as an attempt to pass the burden of ensuring compliance to the government, which is clearly inconsistent with the IFB. In other words, as the qualification increased the government's liability, it decreased that of Company "A", accordingly.

• The Comptroller General rejected that argument focused on the fact that the bid qualification, which made work contingent upon the government cleaning the tanks and making them gas-free, resulted in a conditioned bid that created obligations on the government, inconsistent with the IFB. Upon conclusion of its detailed analysis of the facts, the Comptroller General held that the qualifying terms of Company's "A" bid created an opportunity for Company "A" to correct or withdraw its bid, and such created a competitive advantage. The Comptroller General concluded that because the condition alters the legal relationship between the agency and the contractor, it is a matter of substance that cannot be waived to make the bid responsive. Moreover, the Comptroller General refused to accept Company's "A" low bid price as an argument for waiver, stating that "the possible monetary savings under a particular contract does not outweigh the importance of maintaining the integrity of the competitive bidding system by rejecting nonresponsive bids."

Comptroller General's recommendation:

• Finally, the Comptroller General recommended that the District terminate Company "A"'s contract for convenience and award a contract under the IFB to Company "B", if otherwise appropriate. A recommendation was also made for the District to pay Company "B's" reasonable protest costs and attorneys' fees.

Lessons Learned:

The lesson learned in this case is that the Contracting Officer originally made the correct determination to reject Company "A's" bid as nonresponsive. The IFB specifications and Statement of Work provided clear and reasonable requirements for the tank valve's upgrade, the liability for which was transferred to the Government by the qualifying statement. *Company "A"should not have been allowed to waive its qualifying statement after bid opening.*



This report responded to the Commander's directive that the Engineer Inspector General conducts an USACE-wide inspection of the Acquisition of Information Technology. The following were evaluated for the Corps' investment for future practices:

Appropriate usage Cost Effectiveness Proper Management

Methodologies

The review recognized that in past reviews of the Corps' Information Technology (IT) initiatives, most of senior leadership had yet to embrace IT as an asset for effectiveness and Innovativeness for the command's future success.

The Corps' lacked in the following criteria:

- a. The usage of an approved IT strategic plan and the process for evaluating and selecting did not have a sound set basis.
- b. Activities are inconsistent in the manner in which they identify and report on their investments in automated information systems.
 - c. Adequate economic analyses or a measurement for performance tracking records does not support investments.

The above findings have determined that USACE does not treat IT projects as significant investments and manage them accordingly.

The Inspection report contains 40 recommendations in three major areas: Leadership and Training, IT Investment Management Process, and Contracting for IT.

SOURCE: USACE Engineer Inspector General Inspection Report, 15 APR 98

Additional Findings Worth Noting to Contracting Officers

SUBCONTRACTING

FINDING: Subcontractor hours and dollars being expended in support of the USACE Automation Plan (CEAP) contract are not being identified as such for pricing and invoicing purposes.

RECOMMENDATIONS:

- 1. PARC issue guidance on comprehensive pricing and invoicing strategies for significant (e.g., 40%+ of total direct labor hours) subcontracted effort required under contracts for support services.
- 2. HQUSACE Director of Information Management ensure that contracting office responsible for awarding the next CEAP contract specifically address, in the terms and conditions of the contract, the manner in which anticipated subcontract effort is to be handled from a pricing and administration perspective.

MARKET RESEARCH

FINDING: Corps contracting offices are not conducting a thorough market research in their efforts to acquire IT supports services.

RECOMMENDATIONS:

1. PARC issue guidance on the use of Government wide Agency Contracts (GWACs), emphasizing the need to do market research (of a depth appropriate for the circumstances)

prior to entering into/renewing an interagency agreement.

2. PARC in coordination with Office of Chief Counsel, issue guidance on the preparation of the "determinations and findings" mandated by the Economy Act, or determine that the Clinger-Cohen Act applies.

3. Commanders ensure that adequate market research is conducted before entering any contract or interagency agreement for support services.

PERFORMANCE MONITORING:

FINDING: The level of performance monitoring of contractors providing support services at Corps offices does not ensure that work accomplished is commensurate with hours expended.

RECOMMENDATIONS:

- 1. PARC coordinate with Director of Information Management to issue guidance regarding the detail required in monthly progress reports in contracts for IT support services.
- 2. Commanders ensure that monthly progress reports are of sufficient detail to ensure that work accomplished is commensurate with the hours expended.

PERSONAL SERVICES CONTRACTS

FINDING: Some of the Corps' contracts for IT supports services contain elements peculiar to a personal service contract.

RECOMMENDATIONS:

Commanders ensure that the Statements of Work of their contracts for IM support services are of sufficient detail to avoid the perceptions that they are personal service contracts.

ROLES AND RESPONSIBILITIES FOR IT ACQUISITION POLICY

FINDING: Current guidance gives overlapping roles and responsibilities for IT acquisition.

RECOMMENDATIONS

USACE Chief of Staff clarify the roles and responsibilities of the PARC, Director of Information Management, Resource Management, and other key HQUSACE personnel in IT acquisition and management.

PARC Note: The foregoing is a heads-up on forth coming guidance and highlights the critical need for Clinger Cohen training for contracting officers buying Information Technology equipment and services.

CENTRAL CONTRACTOR REGISTRATION (CCR)

(Roger Adams, CEPR-P)

Central Contractor Registration (CCR) is a relatively new DOD-wide system. Since there have been many requests from contractors for the information below, it is provided for your information and use.

Facts:

a. Per DFARS 204.7302, after 31 May 1998, prospective contractors must be registered in the CCR database prior to award of a contract, basic agreement, basic ordering agreement, or blanket purchase agreement, unless the award results from a solicitation issued on or before 31 May 1998.

This mandate applies to all types of awards except:

- (1) Purchases made with Governmentwide commercial purchase cards.
- (2) Awards made to foreign vendors for work performed outside the U.S.
- (3) Classified contracts or purchases.
- (4) Contracts awarded by deployed Contracting Officers in the course of military operations or contracts awarded in the conduct of emergency operations.
- (5) Purchases to support unusual or compelling needs of the type described in FAR 6.302-2.
- b. **Purpose of CCR** To ensure DoD compliance with the Debt Collection Improvement Act of 1996. This process facilitates registration by a commercial company as a Trading Partner with DoD. It will eventually supplant the use of SF 129 (the Solicitation Mailing List Application) form of registration; a contractor will only need to register once and not with each Contracting Office within DoD. Also, it provides the DoD finance offices a means to verify payment data for electronic payments to the contractors. If a contractor is not in the system, he/she will not be paid.
- c. **Origination of Requirement** This was one of the results of the Debt Collection Improvement Act of 1996. DoD's requirement came out of the Office of the Undersecretary of Defense.
- d. **Registering in the Database** Instructions, forms and guidance for registering are found on the Internet at the following address, "http://ccr.edi.disa.mil". There are three methods for registering a company in the CCR database.
 - (1) If a contractor has arranged for EDI capability through a Value Added Network (VAN) that deals with the Government, they can help the contractor register through an electronic transaction known as an 838 Trading Partner Profile. This is the quickest and easiest method for EDI-capable firms.
 - (2) Register electronically by accessing the on-line <u>Central Contractor</u>
 <u>Registration</u> form. The CCR Registration allows the contractor to submit a basic registration as well as a more detailed registration.
 - (a) The basic registration, referred to as the 'EZ' Registration, covers the minimum amount of information required by the Government to register

with CCR.

(b) A detailed registration allows the contractor to provide Optional Information (e.g. security and quality standards met by the company, Federal Stock Classes/Product Service Codes

which apply to the goods or services, which the contractor sells. It also allows a contractor to register his or her company as EDI-capable.

(3) For those firms who do not want to register electronically, they can complete the paper registration form and mail or fax the application to the appropriate Registration Assistance Center (RAC). The registration

form can be obtained from the same internet address stated above.

- (4) After receipt of the completed registration form, it takes 15-30 days to enter the information into the system.
- e. Handling of Subsidiaries, Subcontractors, and Joint Ventures under CCR If subsidiaries, subcontractors or joint ventures are to receive any direct payments from the Government, then they will have to likewise be registered. Each member of a joint venture must be registered before a contract can be awarded; the joint venture will not register as a separate entity. Also, as stated before, no contract can be awarded unless the awardee is registered.
- f. **Security and Maintenance of System** Each contractor will provide their own data to the Government, who will initially enter it into the system. They will be assigned a Trading Partner Identification Number (TPIN #). This is a security code/number that allows only that contractor to access his/her personal database. No other contractor can access this database <u>unless they give them the number, which of course is discouraged</u>. With this number, a contractor can update and change information when needed; however, the minimum requirement for a firm to update it is annually. The Government does not make changes to the account, the individual contractor does. Only, the following Government personnel have access to this database:
 - (1) Contracting Officers currently have limited access and can only ascertain whether contractors are registered, or not.
 - (2) Information Management Personnel those who maintain the system have unlimited access; however, they have to sign on to the system and utilize a password.
 - (3) DoD Finance they have unlimited access; however, they also must sign on and use a password.

INDUSTRIAL RELATIONS UPDATE

(Kathleen Love, CEPR)

The following information is extracted from Contractor Industrial Relations (CIR) Information Letter No. 98-6, published by the Office of Chief Counsel.

I. DEPARTMENT OF LABOR'S CLARIFICATION OF ALL AGENCY MEMORANDUM NUMBER 157.

On Friday, 20 November 1998, the Department of Labor (DOL) published a notice in the Federal Register (63 FR 64542) relating to the DOL's All Agency Memorandum Number 157, dated 9 November 1992. This Notice was published in order to comply with the Department of Labor's Administrative Review Board (ARB) decision of 17 July 1997. In ARB Case No. 96-133, the ARB upheld the DOL's position concerning the exercise of an option obligating a contractor to perform work for a period of time for which it was not obligated under the terms of the original contract. The DOL has maintained that under such circumstances a new contract has been created for purposes of requiring the incorporation of a new wage determination.

By way of background, the issue of Davis-Bacon Act requirements in connection with option provisions has been the basis of long standing contention between the Department of Labor (DOL) and the Department of the Army. *As noted above, the DOL's position has been that the exercise of an option extending the period of performance represents the commencement of a new contract.* In support of its position, the DOL noted the requirements under 29 CFR 4.145 (a) of its Service Contract Act regulations to obtain current Service Contract wage rates with the exercise of options in service contracts. The Department of Army's Labor Advisor did not concur in the DOL's position arguing

that the DOL, in adopting this position, failed to comply with the rule making provisions of the Administrative Procedures Act (5 USC 553). The Labor Advisor determined that the DOL's reliance upon its Service Contract Act regulations in this matter was inappropriate. Accordingly, by means of Acquisition Letter 94-6, the Army Labor Advisor directed the Army not to comply with the provisions of the All Agency Memorandum.

In view of the ARB decision, the Army Labor Advisor has determined that the previous DA position set forth in Acquisition Letter 94-6 is no longer valid. The FAR Labor Committee is currently developing FAR guidance in accordance with the DOL's policies as set forth in the All Agency Memorandum as clarified by the 20 November Federal Register Notice.

II. APPROVAL OF WAGE RATES UNDER COST REIMBURSEMENT CONTRACTS.

The Office of Counsel has received a number of inquiries relating to the application of FAR Clause 52.222-16, *Approval of Wage Rates* in solicitations and contracts for cost-reimbursement construction. In particular, these inquiries suggest that this clause has been cited by contracting officers and contractors as establishing Davis-Bacon Act wage rates as both a minimum wage rate to be paid by contractors and the maximum wage rate for which the Corps will reimburse its contractors. For purposes of the following discussion, the clause is set forth below.

Approval of Wage Rates (Feb 1988)

All straight time wage rates, and overtime rates based thereon, for laborers and mechanics engaged in work under this contract must be submitted for approval in writing by the Head of the Contracting Activity or a Representative expressly designated for this purpose, if the straight time wages exceed the rates for Corresponding classifications contained in the applicable Davis-Bacon Act minimum wage determination included in the contract. Any amount paid by the contractor to any laborer or mechanic in excess of the agency approved wage rate shall be at the expense of

the Contractor and shall not be reimbursed by the Government. If the government refuses to authorize the use of the overtime, the Contractor is not released from the obligation to pay employees at the required overtime rates for any overtime actually worked.

As a preliminary matter, it is noted that the Davis-Bacon Act was enacted as a labor standards protective measure. The Act was "designed to protect local wage standards by preventing contractors from basing their bids on wage rates lower than those prevailing in the area." (House Committee on Education and Labor. Legislative History of the Davis-Bacon Act. 87th Cong. 2nd Session. (Comm. Print 1962)). There is nothing in the legislative history to indicate that its intent was to form a maximum wage rate or ceiling. The Supreme Court, in the <u>United States v. Binghamton Construction, Inc.</u> 347 U.S. 171 (1954) noted that the "...Act is a minimum wage law designed for the benefit of construction workers. The Act does not authorize or contemplate any assurance to a successful bidder that the specified minima will in fact be the prevailing rates. Indeed, its requirement that the contractor pay "not less" than the specified minima presupposes the possibility that the contractor may have to pay higher rates."

Recently, the Office of Counsel has received inquiries from construction union representatives wherein it is alleged that Government prime contractors have been advised by USACE Contracting Officers that the above FAR clause prohibits the Government from reimbursing contractors for any wages paid in excess of those set forth in the contract Davis-Bacon Act wage determination. As a result, contractors with whom the unions had been negotiating collective bargaining agreements have refused to bargain. The net effect of such interpretation of the subject FAR clause may be to expose USACE to possible litigation based on its improper interjection in the collective bargaining arena established under the National Labor Relations Act. Further, it is at least arguable that such an interpretation places the Government in the position of assuring that labor could be recruited at the Davis-Bacon Act wage rates.

Contracting Officers are advised that the subject clause requires contractors seeking reimbursement under-cost reimbursable contracts to obtain written approval by the Head of the Contracting Activity when the straight time wages exceed the rates for corresponding classifications contained in the applicable Davis-Bacon Act minimum wage determination included in the contract. In accordance with established cost principles, these costs must be allowable and allocable.

Y2K

(LTC Tillman, CEPR)

I am sure everyone within the Corps of Engineers has heard by now of the potential for disaster to our information systems at the turn of the century, Year 2000 (Y2K). The Corps is and has been aggressively seeking for many months now to establish methods for ensuring that our information technology will accurately process date/time data from, into, and between the twentieth and twenty-first centuries. The danger is that many of the projects that we have worked on over the last twenty or so years (buildings, subsystems, dams, locks, etcetera) have incorporated some form of an information processing clock into its functional characteristics which is not known today and will not operate properly after the change to the year 2000. A building's elevators, or heating and air conditioning system, or even the security system within an office may malfunction with the turn of the new century. I am sure you can imagine some of

the possibilities and also the difficulties we are having with identifying all the problem areas. For our part (the contracting chain of command) in helping to rectify this situation, we have begun reviewing all active contracts (not closed out), excluding credit card or small purchases (<\$25,000/purchases recorded on a DD Form 1057), to determine which contracts have a need for modification and which projects will require some other type action (the contract, itself, may be too far along to modify now). This information is reported monthly through the Information Management chain of

command to the Chief of Engineers as a part of the Commanders Y2K Survey. It does not matter if the contract was for construction, goods, services, or A&E, we are merely stating a percentage of the total number of contracts which have been fully reviewed for Y2K implications. *Our intention with this exercise is to ensure that we do not accidentally over-look a contract needing some corrective action to make the product Y2K compliant.* You may also review the Y2K Contracting Readiness chart through the Internet at http://www.usace.army.mil/im/ceimp/y2ksurvey.html. PLEASE NOTE: This review was to be completed by 31 December 1998 in accordance with previous CEIM guidance.

Coincidental to this review, the PARC has asked for a listing of all identified active contracts that do not, but should have included Y2K compliance language and what actions are being taken to obtain compliance. By simply registering the contract numbers during the review described above (contracts which <u>your command determines</u> will require some action) and stating whether the action is either to modify the existing contract to include the compliance requirement, to seek guidance from the requiring activity, or solicit a new contract to modify the resulting product

(whatever your command deems as appropriate), you are helping to ensure the Corps is better prepared to face the impending future. This small, monthly act identifies your intended plan of action for making each of the contracts Y2K compliant.

In addition, the PARC has previously published memoranda (such as CEPR-P memorandum, dated 18 September 1998, subject: Year 2000 (Y2K) Compliance) indicating that effective 1 October 1998, contracting officers are not to sign any contractual instruments that obligate funds for any information technology or national security system requirements that process date-related information that does not contain Y2K requirements specified in FAR 39.106. This edict also pertains to credit cards and small purchases, which do not normally have the full statement of work

available for review as mentioned above. While these small purchase type situations typically pertain only to commercial items or non-critical incidental parts, there is the potential for a critical element of a system to be purchased using a credit card.

To assist contracting officers developing solicitations, the following Y2K compliance language is recommended for inclusion in Section 00800 of construction contracts and is intended to standardize the Y2K requirement throughout the Corps:

Year 2000 Compliance:

- a. In accordance with FAR 39.106, the contractor shall ensure that with respect to any design, construction, goods, or services under this contract as well as any subsequent task/delivery orders issued under this contract (if applicable), all information technology contained therein shall be Year 2000 compliant. Specifically:
- b. New Contracts. The contractor shall:
 - (1) Perform, maintain, and provide an inventory of all major components to include structures, equipment, items,

parts, and furnishings under this contract and each task/delivery order, which may be affected by the Y2K compliance requirement.

- (2) Indicate whether each component is currently Year 2000 compliant or requires an upgrade for compliance prior to government acceptance.
 - b. Existing Contracts. For existing construction contracts which presently do not contain the requirement

for Y2K compliance, use the statements in paragraphs a and b above, to effect any required modification to the contract.

d. <u>Architect and Engineer Contracts</u>. The following language is provided for requesting Y2K compliance to be included in all products:

"Year 2000 Compliance; the Architect/Engineer (A-E) shall insure that the hardware, firmware, software, and information technology systems separately or in combination with each other or other elements specified in the documents developed under this contract shall be year 2000 compliant in accordance with FAR 39.106."

The Y2K contract compliance language provided for IT supply and services contracts in SARD-PP, memorandum dated 21 October 1997, subject: Assuring Year 2000 Compliance in Information Technology (IT) Contracts,

remains in effect.

Should you have any specific Y2K contracting questions, please contact LTC Martin R. Tillman of my staff at (202) 761-8641 for assistance. Together we can minimize the negative impact on our information systems during the transition period into the new millennium.

HIGHLIGHTS FROM THE CORPS CONTRACTI NG COMMUNITY

Acquisition and Partnering

(James P. Moore, Resident Engineer Northeast Resident Office, Tobyhanna, Pennsylvania)

Acquisition and Partnering are two words not normally used in the same sentence. We often think of acquisition (at least developing the strategy) as something that happens before a contract is advertised and awarded, while partnering is done (with the construction contractor) after award. In fact, acquisition is the timeline process preceding and continuing over the life of a contract, and partnering is something that can (and should) begin, among the District team members, long before the construction contractor is chosen.

Recently, the Association of General Contractors (AGC) met with senior Corps leaders including the PARC to discuss ways to improve and enhance the Partnering Process. I was one of two representatives of the Baltimore District at that workshop; we were joined by Vernon Perdue, a Project Manager for the Fru-Con Corporation, our construction contractor for a portion of an ongoing levee-raising project on the Susquehanna River. Our joint discussion centered on ways in which Partnering has helped us to move this project forward. One of the examples we cited was our joint efforts to stabilize and repair a slide which occurred in December 1998, just as we were preparing to suspend operations for the winter. Both Fru-Con and the Government realized that working on the water during the winter months would be unpredictable. We also realized that if we did not stabilize the slide it might continue, essentially cutting the project in half, and jeopardizing our chances of completing the project in 1999.

In order to address the problem and mitigate future damage, our District drill crew and design team mobilized to investigate the slide within 24 hours. Within two days, we had enough design data to begin discussions with Fru-Con on a proposed scope of work. We also decided to utilize the authorities and quantities within our existing unit price contract to place some rockfill immediately adjacent to the slide, arresting the movement until we could complete our investigation and design activities. By Day 4, using some survey information and design suggestions supplied by Fru-Con, our Engineering Division was able to produce sketches, which we used to determine quantities and prepare a Government Estimate and our Pre-Negotiation Objectives. Meanwhile, Fru-Con began preparation of their cost proposal.

On Day 5, we met to discuss the scope of the work. We soon determined that the required material quantities and weather constraints could considerably delay the execution of this work. We also identified many environmental and contracting issues which required immediate resolution. One of our assumptions, the use of on-site gravel bars, was

deemed unacceptable based on discussions with our Planning Division, because of adjacent Peregrine Falcon (an endangered species) habitat.

This necessitated another look at the designed remedy, and revisions to both the Government and Contractor's pricing. By direct contact with (and site visits by) the members of our project management, design, environmental, legal, contracting, and construction team, we were able to resolve all of these technical and regulatory concerns by Day 12.

On Day 19, we were ready to negotiate a forward-priced supplemental agreement for slide repairs. We were quite surprised by the low production rates assumed by the contractor. Through discussions, we ascertained that the contractor's concerns were based on the high risk associated with performing work in the river during unpredictable winter weather. Since the barges and much of the necessary equipment would be rented, the cost of standby became a very

large consideration. We resolved this issue by essentially removing the risk of weather delay. We negotiated a standby (unit) rate, and stipulated conditions under which that rate would be employed, to compensate Fru-Con for this contingent item. We realized a lower unit price on the basic rate as a result.

With a forward-priced agreement in place, Fru-Con began work on slide repairs 20 days after the first cracks were noted. As of this writing (mid January) the work is 90% complete, and we expect to be finished by mid-February. Thus far, we have only had to implement one compensable standby day, despite the fact that we have experienced three weeks of extreme cold, snow, and ice. We believe that by working jointly with our District partners and with Fru-Con, we were able to avert major technical, cost and time impacts to the project in the next construction season. More

importantly, we will be able to provide increased levels of flood protection to the residents of Wyoming Valley during the annual spring high water season.

This achievement occurred because of effective partnering efforts among the various District elements, the local sponsor, and the construction contractor at the mid point of an existing construction contract. It is a prime example of the success that arises from the continuation of effective partnering throughout the acquisition - the cooperation to develop and integrate engineering, environmental, construction, financial, risk, and contracting considerations to achieve the best results for all parties. Acquisition is more than just advertisement and award; partnering is more than just a day away from the job. When acquisition strategy and the trust that is built by partnering work well together, we have a win-win situation!!

DC PUBLIC SCHOOLS FY 98 CLOSEOUT

(Jerry Rifkin, CENAB)

Using 1 May as a start date and ending with 30 September, the NAD team completed on behalf of DCPS the following acquisitions:

32 contracts
12 modifications

TOTAL \$24,527,534.20

20 simplified acquisitions

TOTAL \$5,719,640.39

\$30,247,174.59

GRAND TOTAL

PARC Note: Hats off to Baltimore District as we forge success in a new market niche for the Corps.

HURRICANE GEORGES

An Intern's Perspective

(by Angela Zahid)

My tour of duty in Puerto Rico for Hurricane Georges disaster recovery, 17 Oct 98 – 13 Nov 98, was a most valuable learning experience. I am a Contract Specialist intern, GS-07, which made me the only one in the office with limited experience in the Contracting field. Most of the others were GS-11 and GS-12 Contract Specialists, some of which were also Contracting Officers. It was reassuring to work with such experienced people on my first disaster mission.

Situations that I had learned about in training classes, but had not yet encountered, were actually being put into practice. I knew that meeting immediate needs while still complying with Contracting regulations is possible because special contracting techniques are available for special circumstances. It was exciting to actually see it happening. For example, it was my first time working with contracts that had been set up as letter contracts. They had been set up during the initial stage of the disaster, when immediate action was necessary. Processing purchase orders in confirmation of verbal orders was also something new for me. We mostly worked with construction and service IDIQ contracts, such as Temporary Roofing and Debris Reduction, and with purchase orders and credit card purchases.

Having daily interaction with contractors was another new experience for me. Instead of using the mail system, there was constant communication by phone and in person with contractors. Having groups of contractors in the office at the same time was commonplace. Some of them were not fluent in English and required help with paperwork, as well as requiring explanations in Spanish of what it all meant. In the beginning I felt that due to my limited experience I might slow down the work process. I soon discovered that being fluent in Spanish could greatly enhance progress. In the end I left Puerto Rico feeling that my major contribution to the mission had been my translating and communication ability. It made me feel that I was really helping in situations where translation was necessary.

I learned that a day in a disaster recovery mission can be replete with minor emergencies, due to rapidly changing

situations. There is always something actually happening, vs. something happening on paper, to be actualized in the future. Conversations with employees who worked in the field, instead of in an office setting, brought the realization that we were actually helping people who could not help themselves. It is certainly different from a regular workday at the home district. I learned that people from different places can quickly adjust to working with each other. I felt proud to be part of a group that was so totally devoted to addressing the needs of the mission, while putting their own needs aside.

2 PHASE DESIGN BUILD

THOUGHTS ON THE 2-PHASE DESIGN-BUILD PROCESS: A RECONSIDERATION

(Ed Slana CESAM)

The Mobile District recently awarded its first 2-phase design-build (D-B) project for the construction of a modern air dryer unit attached to a large wind tunnel at the Arnold Engineering Development Center (AEDC), Tullahoma, TN for

approximately \$10M. The procedures governing 2-phase D-B are contained in Subpart 36.3 of the Federal Acquisition

Regulation(FAR). Our experience in Mobile with this evaluation process ended up being quite different from the first

Corps-wide 2-phase award made by Tulsa District at Tinker AFB, OK last year. Tulsa's award involved a corrosion control facility for aircraft. Interestingly, the customer for both the Tinker and Arnold facilities was the same--Air Force Material Command (AFMC) headquartered at Wright-Patterson AFB, OH. Mr. Rick Hedrick of Tulsa District provided his personal thoughts on this 2-phase process in a previous edition of PARC NOTES.

In order to contrast both projects, one needs to summarize exactly what the contracts entailed. The Tinker AFB corrosion control facility was to design & build a state-of-art structure to service aircraft and systems maintained by the Tinker Air Logistics Center in Oklahoma City, OK. The Corps and Air Force customer started with a "clean sheet of paper" since they were attempting to summon the most modern and innovative technologies from industry to satisfy the needs of the USAF maintenance personnel at Tinker. In fact, neither the Air Force customer nor the Corps knew of all the latest technical solutions involving corrosion control. Tulsa District reported that adequate technical and price competition was exhibited throughout the entire 2-phase process.

The air dryer unit at Arnold was intended to remove moisture from outside air brought into the wind tunnel in order to increase the overall quality of airflow. Although our air dryer project started out with high hopes of exploring innovative technologies, it was apparent from the start that the on-base Air Force engineers and scientists who daily dealt with the testing of aerospace articles in their tunnels felt that the most appropriate and proven way to construct an air dryer unit involved the traditional use of chemical desiccants (drying agents which remove moisture from air). In essence, there was only one solution to increasing tunnel effectiveness from the standpoint of counteracting moisture laden air.

The phase one process the Mobile District embarked upon for air dryer facility had high hopes for many (in excess of seven) firms providing competitive proposals. In actuality, only four firms submitted. Of these four, two were determined to be less than highly qualified. Two firms were then invited to provide the Government evaluators their phase 2 design concepts, management approaches, key personnel, and technical solutions. Having only two firms to compete during this phase seriously curtailed Mobile's flexibility since it required that adequate technical and price competition had to be maintained throughout the remaining selection process. If the excluded offerors had been carried into the second phase, more useful competition would have been the result. By limiting the second step to the absolutely "most highly

qualified" per FAR Subpart 36.303, the Corps and the Air Force artificially constrained themselves to a conservative final source selection decision.

Lessons learned from the Mobile experience in 2-phase D-B are as follows:

- a) Broad latitude and discretion must be part of any design solution. In other words, the Government must not make up its mind ahead of time in terms of where it wants to go technically with a particular project.
- b) At least three (but preferably four or five) proposers must be brought into the second phase in order to insure adequate consideration of all possibilities (technical & price) surrounding the project.

In Saudi Arabia, negotiation is an art, not a science

(Pam Taylor, Ordnance Program Division)

According to Webster's Ninth New Collegiate Dictionary, negotiate means "to confer with another so as to arrive at the settlement of some matter." The most advantageous result of negotiation is a good deal for both the buyer and the seller. This age-old process is alive and well in Saudi Arabia.

I work in the Contracts Branch of the U.S. Army Corps of Engineers, Transatlantic Programs Center, Ordnance Program Division (OPD). As in other contracting offices around the world, OPD personnel often have requirements for goods and services and the money to purchase them. This is when the contracting office gets involved.

Most of our purchases are for our internal OPD customers. For example, each year, due to the annual change of military, we supply each villa with a "soft pack." This includes everything needed to run a household such as linens, towels, dishes, and silverware. We try to purchase what we can in bulk, and must negotiate the prices each time.

The mission of the OPD contracting office is to procure the required goods or services at a reasonable price with delivery within a reasonable amount of time, or faster, if possible. If faster is not possible, it is the additional task of contracting to make it faster.

The request arrives with specifications describing the minimum requirements, an estimate of cost, a fund site and a source or two that can meet their minimum requirements. At this point the question most often asked of us is, "How long will it take you to buy this?" I don't take too much time to answer because the real fun of contracting is about to begin. Whether we are buying professionally or personally, for a million-dollar contract or cases of paper towels, the process of negotiation is the same.

Before I explain the art of negotiation in Saudi Arabia, there are three facts about business here that are important to know. First, it is not politically *in*correct to say sales *men* because they are all just that - men. So a woman who is doing the purchasing for an organization like OPD should not take it personally when the initial greeting is less than cordial.

Secondly, because Islam is the state religion, there are five calls to prayer a day. All businesses must close every day for all five prayer calls. The five times are, day break, noon, approximately 3 p.m., 5 p.m., and 7 p.m. The length of each prayer call varies from 20 minutes to an hour, not including travel time to and from the local mosque. To

the purchaser, this means that the most time one has to buy is three hours, from 9 a.m. until noon, and from 8 p.m. to

11 p.m. One needs to have a good understanding of all the requirements in order to make efficient use of the time available. A nap in the afternoon helps, too.

Thirdly, forget all of the discussions from your marketing class about market niche because it does not apply in Saudi Arabia. Similar types of goods and vendors offering similar services are all grouped together in the city. The shopping areas are called *souks*. The computer *souk* is in one part of town. The textile *souk* is in another. The used car *souk* another. My favorite is the gold *souk*.

There might be 10, 20 and sometimes 50 shops all with the very same items. It makes it very efficient for the buyer because you just go to the area of town that has all the vendors for the commodity that you want. Competition is keen. Each vendor literally calls you into his store with an offering of the lowest price. However, the price he offers is never the lowest he will go. This is where the art of negotiation is a buyer's biggest asset and the fun begins.

After you have located the required item, the next step in Saudi Arabia is to choose the vendor who appears to want to bargain for the best deal. Some of the vendors are very exuberant and call you into their shops using all kinds of arm motions and hand signals. Some sit in the corner and don't even look up. These are the ones who are memorizing the Koran, the Holy Book of Islam or they were out late the night before. I prefer to choose the vendor who looks alert and simply invites me into his store to look around. This is the opening phase of negotiation.

Next is the action phase. I ask how much. When he tells me, I put my hands on my heart and feign an attack.

This is when he offers me a chair and a cup of "chai," which is some of the sweetest, hot tea in the world. If I play my cards right, I can get two or three cups of "chai" out of the deal along with the merchandise that I came to buy.

At this point, I make him an offer that I think he cannot refuse. His response is a hearty laugh and he gets himself a cup of "chai." Conversation continues with discussion of children and family and the good and bad points of each of our countries of origin. We finally get back to discussion of price. After much arm waving, head shaking, and, even threats to leave the shop, we are coming to the end of the action. We are both tiring of the activities and we have come to a near agreement on price.

The closing is a very satisfying part of the deal. He mentions the price that I had in mind when I entered his shop and I agree to pay it. The agreement is sealed with a handshake and an exchange of Saudi riyals. We are both smiling. He is smiling and thinking that I too have made a very good deal, and that I will deliver the required item faster than I thought possible.

In Saudi Arabia, negotiation is truly an art. The business of contracting is accomplished in the ways of a bygone era. After the deal is struck, the buyer and seller know that they each have made the best deal. The opportunity for the next best deal is not far from either of their minds. The next time they meet it will be like the meeting of old friends.

In the times of electronic contracting, reinventing government, and paperless procurement, sometimes, for some places, the old ways work best and we can have fun in the process. When I next return to the United States, I wonder if I can get a cup of "chai" and negotiate the same way when I go to Walmart.

WHAT'S NEW ON THE CAREER FRONT

Training Update

Sustaining Base Leadership and Management Program (Resident)
(Formally known as Army Management Staff College)

(Mary Fitzgerald, CEPR)

DESCRIPTION

The resident Sustaining Base Leadership and Management (SBLM) program provides graduate-level advanced professional development across the functional areas in the sustaining base. These areas include:

Leadership, Management, and Decision Making

National Security

Military Forces and Doctrine

Force Integration

Resource Management

Acquisition and Logistics

Personnel Management

Information Management

Installation Management

The program is presented in an integrated manner, and is designed to stress the linkages, relationships, and

dependencies between issues. The program's approach to education focuses upon broad-based leadership, management, decision making, and knowledge of the Army and its context. The academic program emphasizes executive-level education over training, and focuses on enduring principles and concepts over transient or procedural activities.

The material is presented in a mix of seminars, lectures, case studies, field trips, guest speakers, and practical exercises; the students assume rotating leadership positions. The content stresses critical thinking and active learning, intensive student self-preparation, and progressive advancement to higher levels of analysis through synthesis.

Curriculum

Expertise generally develops along functional lines, creating wonderfully experienced individuals whose expertise stands to benefit from a greatly expanded view of the Army and the environment in which the Army does business. The AMSC uses the themes of leadership, management, and decision making to interactively link functional areas with the greater

Army, its systems, policies, missions--and people. Throughout the SBLM program (Resident and Nonresident), curriculum and faculty-student learning teams bind together the themes of leadership, management, and decision making with current and emerging issues facing the Army.

The current SBLM (Resident) curriculum consists of terms, which are core topics, themes, and issues of the sustaining base, and tracks, which are the sustaining base's emerging issues. Beginning with Class 99-1 students will enjoy a revised curriculum.

Educational Methodology

The College's approach to education focuses upon broad-based leadership, management, decision making, and integrative knowledge of the Army and its context for senior sustaining base managers in a dynamic world environment. The academic program emphasizes executive-level education over training, and focuses on enduring principles and concepts over transient or procedural activities.

The AMSC philosophy is learner and peer-focused on the theory that adults retain about 10% of what they hear, 25% of what they see, and 90% of what they do. The program features life related, problem-centered consequential,

critical thinking. The emphasis is on how to think not what to think.

The focus on peers is reinforced by seminar discourse and group work for individual learning. In small groups, students relate program material to there own prior experience and learning as well as benefit from others' experience. The groups serve to facilitate personal development as group members learn about their own skills of leadership, teamwork, and personal influence.

Congratulations to Monteze M. Jaggers, Gale A. Ross, and Fred J. Strickland for their participation and achievements in Class 98-3.

Huntsville Salutes the New Commercial IT Course for Contracting Personnel Information Management (Investment Management at It's Best)

(Connie Oberle, CEHNC)

There is a course which is designed for program information resource management and contracting personnel who are directly involved in the acquisition of Information Technology (IT). ESI International, in association with The George Washington University School of Business and Public Management, Washington, D.C. offers a comprehensive contract management program, to include a specialized two-day course entitled "Information Technology (IT) Contracting". This is a course covering acquisition of Information Technology (IT) from strategic planning through implementation. The respective functions and responsibilities of these personnel and their relationships throughout the process are defined and explained. The focus is strategic planning to include capital planning and investment control, acquisition planning and requirement definition, performance-based management, and acquisition strategy and contracting.

The Corps of Engineers has been recognized in the past for its IT accomplishments, however, we have yet to fully embrace IT as an asset whose effective and innovative use is critical to our future success. We are continually tasked to look much closer into how investment decisions are being made and to what extent they relate to our vision, as well as review the various contracting methodologies being employed to acquire IT resources and the manner in which those acquisitions are being monitored. There are enormous expenditures of money time, and effort that are going into the management and ongoing modernization of the government and industry professionals. Included in the course are the newest agency requirements, FAR changes, and Clinger-Cohen provisions (also known as Information Technology

Management Reform Act) and their impact on your daily contracting activities. The course highlights the latest rules on procedures, which the government and industry representatives must follow when managing the procurement and sale of computer software and hardware. It is essential that contracting professionals in the Corp learn the most effective and efficient means for evaluating, structuring and meeting government information technology needs, and for dealing with common and unique aspects of the government's related telecommunications equipment, services, and supplies. The course also covers examination of procurement authority and the need determination.

During the conduct of this course, specific emphasis is placed on the following areas, specific to IT contracting:

- The New Environment Applying the Clinger Cohen ACT to Agency Specific Requirements
- GSA Schedules the current guidance on how the Federal Supply Service of GSA has transformed the multiple award schedule programs. The processes are described, including how BPAs can be used for IT contracting.
- Government Wide Acquisition Contracts (GWACs) Policies/Procedures for making awards of indefinite-delivery contracts and as they relate to IT
- Solicitations focused on structuring solicitations for IT
- Federal Acquisition Streamlining Act (FASA) of 1994
- Performance-Based Service Contracting Structuring the IT requirement to identify the required result rather than the processes to achieve the result
- Outsourcing overview of the A-76 Contracting Out process
- Contracting for Software Development –models of methodology for software development
- Modular Contracting Procurement of major IT systems, a cutting edge approach
- Intellectual Property rights-three principle ways of protecting intellectual property rights
- Past Performance-best practice guidance in collecting, evaluating using past performance information
- Year 2000 potential harm resulting from failure of existing IT to properly transition to year 2000

The federal government has developed a strong dependence on IT in the past few decades and Congress has acknowledged this shift by passage of several pieces of legislation which refine the purpose of agencies, develop strategic plans and measures, as well as annual performance plans to measure their programs. IT investments directly support these plans. Other related acts target federal information resource management policies e.g. the Paperwork Reduction Act of 1995, and the Information Technology Management Reform Act (ITMRA), later renamed the Clinger-Cohen Act of 1996. This law provides a fundamental change in the way the government utilizes IT. It streamlines and redefines the acquisition process for IT. Included were provisions, which repealed the Brooks Automatic Data Processing Act, eliminating the oversight role of GSA and shifting accountability for IT projects to the individual agencies. Clinger-Cohen Act mandates that federal agencies tie their IT investments to their business strategic plan, and measure performance and results from their investments in IT.

You will definitely obtain a much clearer understanding of the information technology acquisition process by attendance at this unique course, including techniques for preparing requests for proposals (RFPs) and strategies for preparing proposals. The comfort zone of many contracting officials responsible for IT procurement is broadened by the information gained during the conduct of this course.

INFORMATION TECHNOLOGY CONTRACTING

Day One

Morning Source of the Acquisition Rules

Federal procurement statutes

Information technology management statutes Federal Acquisition Regulations (FAR)

Federal fiscal law Agency directives

Defining the Requirement

Ascertaining requirements ITMRA's cost/benefit analysis

Developing the Specification

Preference for commercial products

Types of specifications

Tension between specifications and requirement for competition

Federal and industry standards Performance- based contracting

Lunch Break

Afternoon Privatization/Outsourcing

Structuring the Solicitation

Contract type

Evaluation criteria
CLIN structure
Modular contracting
The Service Contract Act

Oral Presentations

Governmentwide, multiple Award, IDIQ Contracts

Day Two

Morning GSA Nonmandatory Schedules

Overview

The most favored customer clause BPAs based on GSA schedules

Technical Evaluations

Mandatory *v.* relative requirements Common Evaluation problems

Information Technology Contracting

Evaluation Issues

Best value

Lowest overall cost Evaluating options Present value analysis System life considerations Past performance

Lunch Break

Afternoon Acceptance

Contracting for Software Development

The Waterfall model

Other software development models

The Software Engineering Institute's Maturity Model

Software capability evaluations

Systems Integration Contracts

Intellectual Property Rights

Patents
Copyrights
Trade secrets

Year 2000

Information Technology Contracting Instructors

Jerome S. Gabig

Jerome S. Gabig is office Counsel in the Washington, D.C., office of Venable, Baetjer, Howard & Civiletti, where he specializes in government contracts. He has extensive experience in major systems acquisitions, including weapon systems, communications systems, and computer systems. He has advised a broad spectrum of clients, from Fortune 100 companies to small businesses, on a variety of issues involving contract formation and administration.

Through his assignments as an Air Force officer, Mr. Gabig gained considerable experience handling complex federal contracts.

Mr. Gabig has instructed at The George Washington University, the Army JAG School, the Air Force JAG School, the Defense Systems Management College, the DOD Computer Institute, and the Naval Post Graduate School. He performed extensive research and analysis to support the Section 800 Panel. He is presently on a process action team for HQ NASA on procurement reform.

His numerous publications have appeared in *The Harvard Journal of Law & Public Policy, The Public Contract Law Journal, The National Contract Management Journal, Program Manager, Contract Management,* and *The Computer Lawyer.*

Mr. Gabig graduated from West Point (engineering), Harvard University (management & administration), and the University of California (law). He founded the Information Systems Committee of the American Bar Association's Public Contract Law Section and currently serves as Vice-Chairman. Mr. Gabig is a National Contract Management Fellow and recipient of the Delaney Awarded for 1993.

Charles Mather

Charles ("Chip") Mather is the co-founder and senior vice president of Acquisition Solutions, Inc. (ASI), a company committed to assisting government agencies improve their acquisition processes and results. With a focus that acquisition is much more than procurement, ASI seeks to assist government agencies by identifying and assisting in the implementation of legislated and policy reforms as well as the application of best acquisition practices.

Mr. Mather retired from a 20-year Air Force career where he was responsible for awarding and managing many of the Air Force's large dollar and complex information technology programs. With assignments at both of the Air Force's central acquisition activities (Air Force Computer Acquisition Center [AFCAC] and Standard Systems Center [SSC]), as well as a tour of duty on the secretary of the Air Force's contracting staff. Mr. Mather was responsible for over 20 major acquisition source selections valued at over \$10 billion. He is probably best known for his ground breaking application of innovative acquisition streamlining techniques first applied to the Air Force's Desktop IV and V programs.

Well known and respected within both industry and government, his efforts to improve the federal acquisition process have resulted in commendations from over 15 federal agencies, receipt of GSA's 1995 Trail Boss Special Achievement Award, induction in the Air Force Standard Systems Center's Hall of Fame, receipt of *Federal Computer Weeks* Federal 100 Award, *Government Computer News'* Improved Information Technology Award, and the Air Force Communication Command's Professionalism in Contracting Award.

Information Technology Contracting Syllabus

With the enormous expenditures of money, time, and effort that are now going into the management and ongoing modernization of the government's information resources, this special course it's a must for government and industry professionals.

You'll learn the most effective and efficient means for evaluation, structuring and meeting government information technology (IT) needs and for dealing with the common and unique problems and issues that can arise at each step. The course provides you with all aspects of the government's annual

multibillion-dollar program for acquiring information technology (automatic data processing and related telecommunications equipment, services, and supplies).

You'll obtain a clear understanding of the information technology acquisition process including techniques for preparing requests for proposals (RFPS) and strategies for preparing proposals. You'll also examine procurement authority and needs determination, as well as review significant board and court cases.

You'll learn:

- How to creates and interpret the unique specifications involved in IT contracts
- The newest agency requirements, FAR changes, and Clinger-Cohen provisions and their impact on your daily contracting activities
- Procedures for successfully structuring solicitations
- Proven techniques for conducting clear, fair technical evaluations of proposals
- Steps for managing the procurement and sale of computer software
- Procedures government and industry representatives must follow when using oral presentations to evaluate or present IT proposals
- The latest rules on intellectual property-government and industry rights and strategies

WHAT CONTRACTORS WANT THE CORPS TO KNOW

SMALL BUSINESS SET-ASIDES FOR HIGH DOLLAR REQUIREMENTS UNDER SIC CODE 8744, ENVIRONMENTAL SERVICES

Small business set-asides for requirements of up to and in excess of \$200 million are warranted given the increased sophistication and ability of growing numbers of small business, particularly in the information technology and environmental remediation industries. As set forth below, set-asides of high dollar procurements are particularly appropriate for requirements under SIC Code 8744 for environmental remediation.

- Small Businesses Under SIC Code 8744 Are Highly Sophisticated Small businesses performing environmental services under SIC Code 8744 tend to be highly sophisticated and capable of performing complex, highly technical work. Frequent migration of upper level management and project employees between large and small business in this industry contributes to the sophistication of the small businesses. The consolidation of large business environmental contractors has accelerated the transfer of technical experience and management talent to small business. In order to be a responsible and responsive offeror, an environmental remediation firm must have a high level of technical expertise and business sophistication. Consequently, many small businesses performing under SIC Code 8744 has management and expertise levels comparable to large businesses performing similar services.
- Many Small Business Under SIC Code 8744 Have Ample Resources To Perform High Dollar Requirements – The size levels for SIC Code 8744, and in particular environmental

remediation services, permit small businesses to develop strong infrastructures and significant resources. For example, with a size standard of 500 employees for environmental remediation services, small businesses are able to establish a personnel base that can perform even the largest procurements over diverse geographic boundaries.

- There Are Numerous Small Businesses That Can Perform High Dollar Requirements
 Under 8744 Many small businesses are already performing relatively high dollar procurements
 under SIC Code 8744. Consequently, the firms already possess Certified Procurement Systems and
 government approved accounting systems. From an accountability perspective, these firms are fully
 prepared to perform even the highest dollar procurements.
- Qualified Small Businesses Will Respond To Agency Inquiries For Firms Interested In Performing High Dollar Procurements Under SIC Code 8744 There are numerous qualified small businesses that are capable of performing high dollar procurements under SIC 8744. In fact, at least ten environmental remediation firms have revenues of \$20 to almost \$100 million. Thus, in complying with the 48 C.F.R. § 19.502-2 (the "rule of two"), agencies can reasonably expect that they will receive offers from at least two responsible small businesses that are capable of performing the requirement at fair market prices. Given the availability of capable small businesses, other agencies are already soliciting responses from small businesses before issuing high dollar requirements under

SIC 8744. For example, the U.S. Navy, Engineering Field West in San Bruno, California issued a

"sources sought" for interested small businesses to respond to a proposed Environmental Remedial Action Operations/Long Term Maintenance services contract with a maximum dollar value of \$150 million over five years. Additionally, the U.S. Navy, Naval Facilities Engineering Command, Pacific Divisions, has already set aside a \$50 million requirement for Clearance of Unexploded Ordnance and Environmental Restoration Worldwide.

Small Business Are Currently Performing High Dollar Requirements For Other Agencies

Under SIC Code 8744 – The fact that numerous high dollar requirements are already being successful performed by small businesses under SIC 8744 is clear evidence that small businesses are willing and able to perform these type of procurements for the Air Force. A example of the type of procurements under SIC 8744 that already being performed by small business include:

- U.S. Army Corps of Engineers, Kansas City, MO., Site Specific Environmental Remediation Contract, DACW41-98-R-0035 for \$50 million (See attachment)
- U.S. Army Corps of Engineers, Kansas City, MO., MARC, DACW41-98-R-0013 for two contracts with a joint total acquisition value of \$100 million
- U.S. Department of Interior Bureau of Reclamation, Upper Colorado Regional Office, SIC Code 8744, \$98 million
- U.S. Department of Interior Bureau of Reclamation, Denver, Colorado,1425-97-SI-81-91010, SIC Code 8744, for three contracts awards valued at \$50 million each.

U.S. Environmental Protection Agency, Region 2, PR-R2-99-10671, with an approximate value of \$300 million.

- U.S. Environmental Protection Agency, Region 2, W400735, for \$50 million
- U.S. Environmental Protection Agency, Region 5, for \$85 million, 1993-1998
- U.S. Environmental Protection Agency, Region 5, for \$135 million 1998-2003
- U.S. Air Force Center for Environmental Excellence, \$475 million MARC

National Guard, \$590 million MARC (to be awarded)

DAR COUNCIL HIGHLIGHTS

STATUS OF PART 45 REWRITE

Negotiations are ongoing between Acquisition Reform, OFPP, OSD and NASA to resolve some significant issues, which include:

Subcontractor Liability - GSA concerned that current version of the rewrite does not provide as much coverage of subcontractor liability as the current FAR does.

Exemptions DOD and NASA think they have from screening process - GSA can grant waivers of the "special tooling and special test equipment" screening requirement under the Fed Property Mgmt Regulation. Need to reconcile their ability to withdraw waivers with the way it is addressed in the FAR.

NASA's perspective on "as is" equipment - coverage on contractors' expenses changed in current version of the rewrite to state no increase in price or fee, but NASA is concerned that the contractor could make these charges as "direct cost."

AR's alternative approach to Government property - Includes coverage on "bailment," which is not included in the team's rewrite version. Other newly defined terms in the AR proposal include capital asset, capitalization threshold, stipulated value, and high-risk property.

Terminology - Lack of consensus among agencies on terminology used in property disposal section.

CONTRACT BUNDLING

The Small Business Administration published its proposed rule on "contract bundling" in the Federal Register January 13, 1999 (Vol. 64, No. 8.). Closing date for comments was March 15, 1999. The FAR case (#97-306), established to implement Sections 411 417 of the 1997 Small Business Reauthorization Act, is on hold pending publication of SBA's final rule.

<u>SIMPLIFIED ACQUISITION PROCEDURES, DFARS 213 REWRITE (DFARS Case 97D306)</u> Final rule published January 15, 1999 to update guidance on simplified acquisition procedures for consistency with recent FAR Part 13 revisions, published in FAC 97-03.

<u>VALUE ENGINEERING CHANGE PROPOSALS, FAR</u> <u>CASE 97-031</u>

On 14 Jan 99, the DAR Council agreed to a proposed rule which extends the cap on contractor share of savings, extends the maximum share period, extends the contractor's maximum share of collateral savings, and allows calculation of savings on the basis of time.

RANDOLPH-SHEPPARD FAR CASE: A joint meeting was held on January 25, 1999 to discuss major concerns and problems experienced with the applicability of the Randolph-Sheppard Act. Agencies and organizations represented included:

- OSD
- Small Business
- Department of Education
- Army
- Air Force
- Navy

At a December 14, 1998 speech by Vice President Gore, he expressed concern about programs to benefit people with disabilities, recognizing that the Randolph-Sheppard Act has benefited the blind the most.

Ms. Dee Lee, OFPP Administrator authorized establishment of a working group involving concerned parties (OSD, DOE, Small Business and JWOD) for the purpose developing an implementation strategy. In view of the disconnect between a recent arbitration in Hawaii and the recently issued OSD OGC opinion, Army is pursuing a legislative change. OSD will support Army's legislative proposal.

Until such time as the working group releases results of it study, OSD's senior leadership is resolving how to handle the FAR case.

SUSPENSION OF THE PRICE EVALUATION ADJUSTMENT FOR SMALL DISADVANTAGED BUSINESSES (SDBs): The Director of Defense Procurement has suspended the use of the price

evaluation preference for small disadvantaged businesses in DOD procurements as prescribed in FAR 19.11. This suspension was executed because DOD exceeded the established 5% SDB goal for 1998. The departmental letter (being provided under separate cover) announcing this suspension was signed

January 25, 1999, and is effective for a one-year period beginning 30 days after the date of the memorandum. This means that the suspension applies to solicitations issued after February 24, 1999.

Other FAR Cases:

- FAR Case 97-304, Electronic Commerce in Government Procurement. implements the FY98 Defense Authorization Act, which requires establishment of policies and procedures to employ electronic commerce in the conduct and administration of the procurement system. Converted interim rule to final rule.
- FAR Case 98-002, Conditionally Accepted Items. Requires that when conditionally accepting nonconforming items, amounts withheld must be at least sufficient to cover the cost and related profit to correct deficiencies and complete unfinished work. Converted proposed rule to final rule.
- FAR Case 94-792, Refinement of Commercial Rule. Provides clarifications to the Part 12 rules on procuring commercial items. Revised proposed rule.

ELECTRONIC BID SETS STREAMLINE ACQUISITION PROCESS

(Vicki Shepherd, Contracting Directorate)

Since the Federal Acquisition Streamlining Act of 1994 was passed into law, the U.S. Army, and subsequently, the Corps of Engineers, has been moving toward implementing a comprehensive electronic commerce (EC) environment. One of the key components of EC is the Electronic Bid Sets program, known as EBS.

EBS is a method of reproduction, which distributes and advertises contract specifications, drawings, and documents to the contractor community in electronic format using compact disk (CD-ROM) technology. It improves and streamlines the procurement process, eliminating unnecessary reproduction and storage of printed media by the government, and allowing significant savings in our resources.

In 1996, the Corps formed an Electronic Bid Set Working Group, which successfully formulated, developed and tested EBS through five pilot projects. The group is now implementing this program throughout the Corps. With EBS, prospective bidders are allowed to view, search, download and request project solicitation documents electronically via the Internet. A CD-ROM contains all solicitation documents. The only requirement is the use of a Windows-based personal computer and an Internet browser.

As we have done for other initiatives, TAC formed a Process Action Team (PAT) to create the EBS policy. I served as chairperson, and members were Capt. Greg McClure, Mary Bailey, Jane Smith, Wanda Allen, and Kathy Perry. Bill Brewer, chief of Contracting Directorate, was champion. As some of the original team members left, others filled in. Active participants included Dick Constantino, Allen Lane, Karen Willis, Amy Newland, Kelly Kremer, Ron Breen, and Bambi Morris. Our draft policy memo should be published shortly. I'm also working on a very in-depth step-by-step SOP for Contracting personnel on how to create EBS solicitations. With EBS, we expect to see major savings in reproduction and shipping costs. In the case of a recent construction EBS solicitation, the costs for EBS reproduction, including all purely EBS functions such as the creation of plan image files and document conversions, were slightly more than one-fourth of the projected cost of reproducing the same solicitation in paper form - \$1,699 as opposed to \$6,582.

Savings in shipping costs were even more dramatic. Including the labor associated with packaging, the EBS

solicitation was shipped overnight at \$123.08, while the paper version would have cost \$1,269.54, a savings of more than

90 percent. These figures do not take into account any individuals within TAC who may require a paper copy of the solicitation. The cost of printing the solicitation from CD to an in-house laser printer was estimated at \$86 (plans and specs), not including the individual's labor.

To assist bidders in locating electronic solicitations offered by the Corps of Engineers, Navy and Air Force, the Tri-Services CADD/GIS Technology Center has developed an Internet web site ("TSN," or "Tri-Service Solicitation Network"). The URL is http://tsn.wes.army.mil/. It provides contractors a centralized location linking all participating agencies.

We realize that most contractors do not have the in-house plotting capability to print true full- or half-size drawings (A1 size - 36" x 24", the format of all our projects designed prior to March 1998). In March 1998, TAC made the decision to adopt the D size - 34" x 22" - as our standard.

This format will allow contractors to use a laser printer to print drawings to scale on 17" x 11" paper. Until we

begin issuing solicitations using the new drawing size format, we will continue to issue two copies of the CD-ROM to each contractor on the plan holders list. This will enable the contractor to retain a copy for review and use while sending one copy to the printer.

The TSN provides a continuously updated listing on their web site of printing contractors who are familiar with EBS solicitations and how to print them. The contractors are located across the United States and many can be contacted directly by clicking on the hypertext of their e-mail address. The URL for this list is: http://tsn.wes.army.mil/TSNSolicitationPrinting.asp. We include the list current at the time on the CD-ROM when we issue EBS solicitations. When we advertise the EBS on the Internet, there will be a link to the TSN list.

From TSN, a contractor can download the Adobe Acrobat and Source View readers. We include these freeware readers on the CD-ROM when we issue EBS solicitations and will have a link to them on our EBS Internet page.

HQUSACE plans to install a new server, which will allow contractors to register for the bidders list.

That would allow us (and other Corps agencies) to use the sample web page designed and offered for use by

TSN to all participating agencies. Some Corps offices are currently using this standard web page design. USACE has advocated the use of a standardized design to support its "One Door to the Corps" philosophy. If a contractor becomes familiar with one agency's EBS page, he will be more comfortable with another's page if they look and work the same.

Another feature of our EBS solicitations is the linking of the sectional tables of contents to the applicable clauses and provisions. This will enable the contractor viewing the solicitation to click on a clause or provision title in the table of contents and automatically go to that clause or provision. Based on a spot review, other Corps agencies are not incorporating the linking feature, presumably because it must be done manually by the contract specialist and takes at least several hours for an average-sized solicitation.

Because TAC believes the relatively small investment of time and money is more than offset by the value added to the contractor who is trying to learn a new way of doing business, we have made a conscious decision to provide the linking whenever a project's schedule and budget will allow the additional effort.

TAC believes EBS will result in fairly substantial cost savings for our customers. At the same time, we want to

make these solicitations as user-friendly as possible for our contractors. The EBS process is - wisely - moving gradually from infancy to childhood. We remain committed at TAC to making EBS work in a more efficient and pleasant manner.